(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 26 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a deep discount retailer. It seeks to permanently employ the beneficiary in the United States as a Junior Computer Programmer. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree. The director also found that the petitioner had not established that the beneficiary possessed the required employment experience.

On appeal, the petitioner, through counsel, submits an additional employment verification letter. The petitioner also asserts that the labor certification requires a member of the professions holding an advanced degree.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.[1] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[3]

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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[1] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Labor Certification Requirements

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional

degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's
H.4-B Field of Study: Computer Science/IT
H.5. Training: None required.
H.6. Experience in the job offered: 36 months
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Yes
H.8-A If Yes, specify the alternate level of education required: Master's
H.8-C If applicable, indicate the number of years experience acceptable in question 8: 2
H.9. Foreign educational equivalent: Accepted
H.10. Experience in an alternate occupation: Yes
H.10-A If Yes, number of months experience in alternate occupation required: 24
H.10-B Identify the job title of the acceptable alternate occupation: Software Engineer
H.14. Specific skills or other requirements: None

As stated above, the minimum requirements for the offered position is a Bachelor's degree in Computer Science/IT and 36 months (3 years) experience in the job offered or a Master's degree (in Computer Science/IT) and 2 years of experience. The labor certification allows a candidate to qualify based on 24 months in an alternate occupation defined as a Software Engineer, instead of 3 years in the job offered with a Bachelor's degree.

On appeal, counsel asserts that because a Master's degree plus two years of experience would actually be the same as a Bachelor's degree and 7 years of experience, then this meets the definition of an advanced degree.

Counsel's contention is not persuasive since the labor certification does not require a Bachelor's degree and seven years of experience. The minimum requirement on the ETA Form 9089 is a Bachelor's degree and 3 years of experience in the job offered, or two years in an alternate occupation. Since an individual can qualify for the offered position with less than a baccalaureate followed by five years of progressive experience in the specialty, the petition does not qualify for advanced degree professional classification.

Further, there is no provision in statute or regulation that compels U.S. Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different preference classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In summary, the offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

Beneficiary's Experience

The petitioner must establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date. The petitioner must also establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA Form 9089 was accepted for processing on July 26, 2011, which establishes the priority date. The proffered wage as stated on Part G of the ETA Form 9089 is $66,000 per year.

Part 5 of the I-140, Immigrant Petition for Alien Worker, filed on October 27, 2011, indicates that the petitioner was established on January 1, 1982, currently employs over 10,000 workers, claims a gross annual income of $1.2 billion and a net annual income of $4.5 million.

It is noted that the record indicates that the beneficiary earned a Bachelor's degree in Computer Science Engineering from [redacted] in May 2005.[4] He then received a Master of Science degree in Computer Science from the University of [redacted] on May 8, 2007. It is noted that the Form I-140, Immigrant Petition for Alien Worker indicates that he last arrived in the United States on November 12, 2008.

The regulation at 8 C.F.R. 204.5 additionally states in pertinent part:

> (g) *Initial Evidence*-(1) *General.* . . . Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.[5]

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[4]The record does not contain the grade transcripts from [redacted] University.

[5] Relevant to five years of progressive experience in the specialty following a baccalaureate degree, the regulation at 8 C.F.R. § 204.5(k) provides in relevant part:

> (3) *Initial Evidence.* The petition must be accompanied by documentation showing that he alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.
>
> (i) To show that he alien is a professional holding an advanced degree, the petition must be accompanied by:

On the labor certification, signed under penalty of perjury by the beneficiary and the petitioner's representative on October 29, 2011, the beneficiary claims the following jobs:

1. He states that he worked full-time for the petitioner in as a junior computer engineer from March 18, 2009 to July 26, 2011.
2. From January 1, 2007 to March 18, 2009, the petitioner states that he worked full-time for in Houston, Texas as a software engineer.

The petitioner submitted an employment verification letter, dated November 5, 2008 from signed by the president, . Mr. states that the beneficiary worked for as a software engineer since January 1, 2007. Mr. does not describe the beneficiary's duties or state whether the position was part-time or full-time.

On appeal, the petitioner submits another employment verification letter, dated May 16, 2012, signed by the Director of Human Resources of Mr. states that the beneficiary worked for from January 1, 2007 until January 30, 2009 as a Systems Analyst/Software Engineer. Mr. describes the beneficiary's duties, but does not indicate whether the job was part-time or full-time. Further, neither Mr. nor the petitioner have explained the discrepancies in the dates of the beneficiary's employment or job titles as stated on the two employment letters from and the ETA Form 9089. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). As the petitioner has failed to resolve these conflicts by independent competent evidence, the petitioner has not established that the beneficiary possessed two years of experience following a Master's degree or three years of experience following a Bachelor's degree.

Beyond the decision of the director, the record does not clearly establish that the petitioner has had the continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

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(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post -baccalaureate experience in the specialty.

> priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In reviewing a petitioner's ability to pay the proffered wage, USCIS examines whether a petitioner has paid wages to the beneficiary, as well as copies of the petitioner's federal tax returns, audited financial statements or annual reports that may have been submitted. In this case, the petitioner submitted copies of payroll records indicating that as of September 27, 2011, the petitioner had paid the beneficiary $46,931.13, or $19,068.87 less than the annual proffered wage of $66,000. Although the weekly wage indicates a sufficient level of compensation if paid on a yearly basis, the petitioner submitted no annual reports, federal tax returns or audited financial statements from which its ability to pay the proffered wage may also be assessed. Based on the current record, the petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.